PD-1299-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/25/2020 9:00 PM
Accepted 6/26/2020 3:10 PM
DEANA WILLIAMSON
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**NO. PD-1299-18**

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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

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**LESLEY ESTHER DIAMOND**

**VS.**

**THE STATE OF TEXAS**

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**ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON
CAUSE NO. 14-17-00005-CR**

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**Appealed from the County Criminal Court at Law Number 8
of Harris County, Texas
Cause No. 2112570**

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# APPELLANT'S MOTION FOR REHEARING

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**ORAL ARGUMENT REQUESTED**

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Appellant, Lesley Esther Diamond, moves for rehearing pursuant to Texas Rule of Appellate Procedure 79.1. The Court's opinion contains significant factual and legal errors that require correction. The Court will see that it must affirm the court of appeals' judgment granting habeas relief.

## STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument on rehearing. The Court's opinion contains substantial factual and legal errors, and argument will help it distinguish the undisputed facts from the relevant, contested ones and resolve any pertinent questions, which the parties' briefs apparently did not accomplish. The legal issue in this case—how Texas courts should analyze materiality under *Brady v. Maryland*, 373 U.S. 83 (1963)—is too important for this published decision to retain precedential value where it contains so many predicate factual and legal errors.

## FIRST REASON FOR REHEARING

### The Court Erred In Analyzing The Case Under Article 11.072 Because Appellant Did Not Receive Probation And Filed The Habeas Corpus Application Under Article 11.09.

Appellant filed an application for a writ of habeas corpus under article 11.09 of the Code of Criminal Procedure because the trial court sentenced her to jail. She identified that statute in the application (C.R. 4-19); in her opening brief in the court of appeals (Appellant's Brief at 1, filed on April 28, 2017); and in her merits brief in this Court (Appellant's Brief at 1, filed on June 4, 2019). Neither the trial court,

the court of appeals, nor the State ever asserted that the application should be analyzed under article 11.072. That is because appellant did *not* receive probation.

Yet, this Court's materiality analysis—and, most importantly, its purported duty to defer to the trial court's clearly erroneous fact findings—hinges on the application being filed under article 11.072. *See* Slip Op. at 2 ("The post-conviction habeas court . . . denied Article 11.072 relief."); *id.* at 2-3 ("Appellant filed an application for a writ of habeas corpus under . . . Article 11.072); *id.* at 16 ("An appellate court reviewing a habeas judge's ruling in an Article 11.072 application for a writ of habeas corpus must view the evidence in the record in the light most favorable to the judge's ruling and must uphold that ruling absent an abuse of discretion."); *id.* at 17 ("We have previously addressed a significant distinction between the posture of article 11.07 habeas cases and article 11.072 habeas cases when it comes to the standard of review."); *id.* at 18 ("But in article 11.072 habeas cases, the trial judge is the *sole* fact finder. The court of appeals and this Court are truly appellate courts. We have less leeway in an article 11.072 context to disregard the habeas court's findings.") (citations omitted).

***But this is not an article 11.072 case.*** It is an article 11.09 case.

This case presents the optimal vehicle for the Court to consider the broader question of whether it should harmonize the standard for reviewing trial court fact findings in all habeas corpus proceedings, regardless of whether they are filed under

articles 11.07, 11.071, 11.072, 11.08, or 11.09. Appellant proposes that appellate courts should defer to all trial court fact findings *that are supported by the record*. Regardless of which statute the application is filed under, the only inquiry should be whether the record supports the fact findings. Instead, the Court has complicated what should be a consistent standard of review by adopting different standards for different types of habeas cases. An objective bystander cannot square this Court's blind deference to the trial court's clearly erroneous fact findings in this case with its refusal to defer to *any* of the fact findings that were supported by the record in *Ex parte Connors*, No. WR-73,203-03, 2020 WL 1542424 (Tex. Crim. App. Apr. 1, 2020) (unpublished) (suggestion for reconsideration pending) (denying relief on *Brady* claim despite trial court's recommendation to grant relief with fact findings based on determinations of witness credibility and demeanor after evidentiary hearing; held without explanation that trial court's findings and conclusions not supported by record).

The Court should grant rehearing, withdraw its opinion, and order briefing and argument on the unresolved issue of what degree of deference appellate courts should give to trial court fact findings in habeas corpus proceedings brought under article 11.09, as well as the related question of whether it violates federal equal protection and due process principles to apply different standards of review to different types of habeas applicants. It would be inadequate and unconstitutional for

the Court to withdraw its opinion and reissue a substitute opinion that replaces the erroneous references to article 11.072 with article 11.09 without giving the parties the opportunity to address the open question of what standard of review should apply under article 11.09.

## SECOND REASON FOR REHEARING

**The Court's *Brady* Materiality Analysis Erred In Placing Too Much Weight On The Trial Court's Finding That Andrea Gooden Was Not "Suspended" And In Assuming Incorrectly That The Trial Court Discredited William Arnold's Testimony About Gooden's Incompetence.**

### A. Regardless Whether Gooden Was "Suspended," She Unquestionably Was Prohibited From Analyzing Blood Because Of Her Conduct—A Fact Relevant To Impeach Her Credibility.

The trial court's fact findings and this Court's materiality analysis rely significantly on the erroneous belief that William Arnold, Andrea Gooden's supervisor at the Houston Forensic Science Center (HFSC), told her not to test blood in other cases only until she could document what went wrong in the Hurtado mislabeling case, but that he did not suspend her from doing other casework because he doubted her competence. The undisputed facts—namely, the chronology of events—do not support the flawed foundation of the Court's decision.

Gooden discovered that she released the erroneous lab report in the Hurtado case on April 15, 2014 (2 R.R. 36). She notified Arnold and lab personnel the same day (2 R.R. 37). She testified at the habeas hearing that *Arnold sent her an email on*

*April 16 instructing her* to investigate what happened in the Hurtado case and *not to perform any other casework until further notice* (2 R.R. 38-39, 46-47; AX 13). She was not allowed to work on anything other than the Hurtado matter as of April 16 (2 R.R. 49). Importantly, she assumed that she would be allowed to return to her casework after she submitted her memorandum on the Hurtado matter on April 17, *but she was not allowed to return to her casework at that time* (2 R.R. 54, 58). That undisputed fact is critical to the assessment of the trial court's fact findings and materiality analysis. Instead of analyzing blood samples, she only was allowed to clean the lab, respond to discovery requests, and scan paperwork (2 R.R. 56, 87). She testified against appellant at the end of April 2014 (2 R.R. 40). She was not allowed to resume analyzing blood until August 2014, more than three months after appellant's trial (2 R.R. 72-73).

Gooden did not testify, and no evidence established, that the *only* reason she was ordered not to do any casework was "to focus solely on documenting issues surrounding" the erroneous Hurtado lab report. That fact finding is not supported by the record and was the trial court's creation from whole cloth. Moreover, the finding is clearly erroneous because she did not return to her casework when she submitted her Hurtado memorandum on April 17. Had she been removed from casework *only* to prepare the Hurtado memorandum, Arnold would have allowed her to return to casework when she submitted it on April 17. Because he did not

allow her to analyze blood from April 17 through appellant's trial at the end of April, there must have been other reasons for not letting her do her job.

Prohibiting Gooden from analyzing blood even after she submitted the Hurtado memorandum corroborates Arnold's testimony that he suspended her until further notice because, *inter alia*, he was concerned that she did not understand how the blood-alcohol instruments worked and basic concepts of blood-alcohol analysis because she could not answer basic questions about either, as well as her culpability in the erroneous Hurtado lab report (2 R.R. 111-17). Even if the trial court disbelieved Arnold's testimony as to other matters, there had to be an explanation for the fact that she was not allowed to perform blood analysis for two weeks after she submitted the Hurtado memorandum through appellant's trial. The credible evidence establishes that she was not allowed to do her job because her supervisors lacked confidence in her competence. Accordingly, the trial court clearly erred in finding that the *sole* reason that she was removed from her casework was to document what went wrong in the Hurtado case. More importantly, the court of appeals did *not* err in rejecting that finding because the undisputed evidence in the record did not support it.

Regarding the trial court's finding that Gooden was not under an active suspension when she testified at appellant's trial (C.R. 45), that finding is a matter of semantics and does not alter the legal analysis. What matters is that her

supervisors ordered her not to analyze blood or handle evidence until further notice, and that order remained in place through her testimony against appellant (and was undisclosed to the defense). Whether the action against her is labeled a "suspension," "removal from casework," or a "time-out," the undeniable truth is that she was relegated to being a janitor and clerk instead of analyzing blood. That fact finding need not factor into the Court's analysis.

### B. The Evidence Clearly Established That Arnold Believed Before And During Appellant's Trial That Gooden Was Incompetent.

Gooden was a rookie crime lab analyst. Appellant's blood was only the second test that she had performed alone, and appellant's trial was the first time she had testified (5 R.R. 519-20; AX6, at 1; AX 12-3 at 68-69).

At the evidentiary hearing, appellant presented substantial evidence—testimony from Arnold and corroborative documentary evidence—that Arnold had serious concerns about her competence before and during appellant's trial *for reasons in addition to the mislabeled blood* in the Hurtado case.

The trial prosecutor asked Arnold to observe Gooden's testimony and be available to testify (2 R.R. 135-36; 5 R.R. 33). After the trial, Arnold gave Gooden a detailed assessment of her testimony, noting numerous mistakes:

- "Some of the points you testified to were outside your personal knowledge but it sounded as though you were speaking definitively."

- "When asked to explain the function of the internal standard, you

explained that it was similar to having a broken speedometer. In actuality, it is the opposite. If you are in a car with a functioning speedometer, you are able to determine the speed of a car relative to your own speed. Like a functioning speedometer, one is able to determine if another vehicle is moving faster, slower or the same speed."

- "When asked if your analysis was in compliance with the Standard Operating Procedures regarding the use of instrumentation, you repeatedly stated that it was. This was not the case since the SOP stated one must use a particular instrument and method. The correct answer would have been 'no'. In actuality, the use of the other instrumentation is allowed by the validation documentation created after the procedure was written. This was the same question you were asked in your mock trial training on a previous occasion. In that instance you eventually responded correctly."

- "In a review of your training manual, you confused the new Instrumentation (which has a green face plate) with that of the older Instrument (with a blue face plate)."

- "Questions were posed regarding the chain of custody and apparent inconsistencies associated with the initial steps in the chain of custody. While it is appropriate to state what is on the Chain of Custody if asked, you cannot testify to the validity of a transfer or reasons an item is transferred by an outside agency."

- "When questioned regarding the alleged contamination of the sample, you stated that the ethanol value would continue to grow if a sample were contaminated. You should review the scientific literature associated with the neo-formation of ethanol in contaminated specimens. This statement is not supported in the literature."

- "As we discussed on May 2, 2014, two days after your court appearance, you must have a thorough understanding of the science and operation of the Instrumentation you utilize. In early April we had discussions regarding your foundation of knowledge in blood alcohol analysis. To this end you have been undergoing further training and review in an effort to bolster your existing knowledge and ability to testify."

(AX 6; 2 R.R. 75; 5 R.R. 20-23).

Arnold told an HFSC human resources official that he preferred "retraining" Gooden in lieu of formally "documenting [Arnold's] concerns about [her] performance which would make [her] *subject to painful cross-examination*" and that he wanted to avoid damaging her career. Finding of Fact 20.l (emphasis added).

In a subsequent memorandum, Arnold told Gooden:

> In early April [before appellant's trial] you prepared a Power Point at the request of a district attorney for use in court testimony. While reviewing your proposed presentation I took the opportunity to review various facets of this type of analysis with you. *At that time, there were basic [scientific] questions [about blood-alcohol testing] you were unable to answer. Our conversation caused me to question your ability to convey the information and also your understanding of the concepts associated with this type of analysis.* We went to the laboratory and reviewed the function and operation of Headspace Gas Chromatography using the Perkin Elmer equipment. This included a review of the parts and function of the headspace and Gas chromatograph. *It was at this time, I questioned your knowledge base.*

(AX 7) (emphasis added). Arnold observed Gooden testify at trial and failed to notify the prosecutors of the problems with her testimony and competence (2 R.R. 135-41).

Arnold's testimony about the beliefs that he formed before and during appellant's trial were corroborated not only by his June 26, 2014, memorandum to Gooden (AX 6) but also by an August 4, 2014, memorandum that he sent Gooden and his HFSC colleagues (AX 7). The City of Houston's Office of Inspector General's (OIG) report (AX 8) found that, on March 13, 2014—*six weeks before*

*appellant's trial*—Arnold "became concerned about [Gooden's] understanding and ability to explain how the blood alcohol instrument . . . worked" (AX 8 at 6). The OIG also found that Arnold spoke to Gooden a few days after her testimony at appellant's trial and required her to "train" to improve her deficiencies and become competent to testify at future trials (AX 8 at 6-7). The Texas Forensic Science Commission's report criticized Arnold for failing to document and disclose to appellant's prosecutors Arnold's concerns about Gooden's "performance and understanding of analytical concepts" (AX 9 at 27).

### C. The Court Of Appeals Correctly Determined That Arnold's Undisclosed Beliefs About Gooden's Incompetence Were Material Under *Brady*.

The Court of Appeals held that Arnold's beliefs about Gooden before and during her trial testimony constituted favorable, material impeachment evidence that should have been disclosed to appellant, along with the information that Gooden certified *under oath* that she had analyzed blood samples with the wrong defendant's name and had been temporarily suspended from working on criminal cases at the time of appellant's trial. *See Diamond v. State*, 561 S.W.3d 288, 295-96 (Tex. App.—Houston [14th Dist.] 2018, pet. granted).

> Had she known about Gooden's "suspension," her certification of the erroneous report in the unrelated case, and Arnold's lack of confidence in her understanding of the basic science, appellant claims she would have attempted to exclude Gooden's testimony and, if unsuccessful, would have used the evidence to impeach Gooden. . . . Appellant . . . argues she would have called Arnold to testify regarding his misgivings about Gooden's abilities. . . . Arnold claimed he had concerns about

> Gooden's level of knowledge and understanding regarding her "knowledge base" and her inability to answer "basic questions." This is favorable evidence with which to impeach Gooden's qualifications in performing the blood analysis and question the reliability of her opinion that appellant had a BAC of 0.193. . . . We . . . conclude that if the habeas court had not excluded Gooden's testimony but allowed appellant to cross-examine Gooden with the undisclosed evidence, there similarly is a reasonable probability that the jury would have reached a different result.

*Id*. at 295-96.

Most important, the court of appeals applied the proper *Brady* materiality analysis set forth by the Supreme Court. It correctly noted that none of the trial court's fact findings was inconsistent with its materiality analysis concerning Arnold's beliefs about Gooden's incompetence formed before and during appellant's trial. *Id*. at 295 (***"The habeas court made no findings regarding evidence of Arnold's lack of confidence in Gooden's understanding of the basic concepts underlying the performance of her duties."***) (emphasis added). The only finding that discredited Arnold concerned his claim that Gooden was "suspended"—as opposed to merely being "removed" temporarily from analyzing blood. *See* Finding of Fact 33 ("This Court finds suspect and unpersuasive Arnold's use of the term 'suspended' or 'under suspension' in describing Gooden's work status at the time of the applicant's trial . . . ."). But, as discussed *supra*, the terminology used to describe why she could not analyze blood is unimportant. Rather, she could not analyze blood for several weeks leading up to and including appellant's trial, and

long after she finished her memorandum addressing the Hurtado matter. Thus, the court of appeals did not err in how it reviewed the trial court's fact findings when analyzing *Brady* materiality.

### D. The Court Erroneously Disregarded The Significance Of The Evidence Of Arnold's Undisclosed Beliefs About Gooden's Incompetence Based On The Incorrect Assumption That The Trial Court Discredited All Of Arnold's Testimony.

In holding that the court of appeals erroneously rejected the trial court's fact findings, this Court asserted that the trial court disbelieved *all* of Arnold's testimony:

> After Appellant's trial, Arnold made a number of claims related to Gooden's work status and competency as an analyst. Specifically, during his habeas testimony, Arnold claimed that at the time Gooden testified in Appellant's trial, she was "suspended" from casework due to the Hurtado incident and his concerns about her overall knowledge base. *But the habeas court did not believe Arnold*. It found that at the time of Appellant's trial, Gooden had been temporarily removed from casework to document the Hurtado error. And Arnold's use of the term "suspended" or "under suspension" to describe Gooden's work status was "suspect" and "unpersuasive."
>
> . . .
>
> In making th[e] determination [that a *Brady* violation occurred], the court of appeals relied heavily on Arnold's testimony that he lacked confidence in Gooden's overall knowledge base. The court also concluded that the undisclosed evidence was material because Gooden's testimony was necessary for the jury to make an affirmative finding on the special issue of whether Appellant's BAC level was 0.15 or more.
>
> . . .
>
> ***[T]he habeas court, as the exclusive judge of the credibility of the witnesses, determined that Arnold's description of events and his***

> ***views regarding Gooden's performance were not credible. The habeas court rejected Arnold's purported reasons for removing Gooden from casework, including his alleged concerns about her knowledge base and inability to answer basic questions.***
>
> . . .
>
> Finally, Arnold's claims regarding his concerns about Gooden's knowledge base were not credible and therefore do not undermine the reliability of her testimony that Appellant's BAC was 0.193.

Slip Op. at 10, 15, 22-23, 24-45 (emphasis added) (footnote omitted). The record does not support these representations of the trial court's findings.

As the court of appeals correctly observed, the trial court did *not* discredit Arnold's testimony concerning his beliefs before and during appellant's trial that Gooden was incompetent. Rather, the only finding concerning Arnold's credibility was Finding 33, which discredited only his use of the term "suspension" to describe why she could not analyze blood. That finding did not constitute a wholesale rejection of his testimony about her incompetence. As discussed *supra*, the chronology of events supports Arnold's testimony that he did not allow Gooden to work because he doubted her competence.

The proper factfinder to decide whether Arnold doubted Gooden's competence should have been the jury, not this Court reviewing a cold record. Arnold, a member of the prosecution team under *Brady*,[1] withheld his concerns from

[1] *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutors have duty to learn of any evidence favorable to defense that is known to others acting on government's behalf); *United States v. Auten*,

the trial prosecutors because he did not want to subject Gooden to "painful cross-examination." Finding 20.l.

In assessing materiality, this Court should have considered the effect of a "painful cross-examination" had appellant not only questioned Gooden about Arnold's concerns but also called Arnold to impeach Gooden. Arnold's June 26, 2014, memorandum (AX 6) identifies several errors in her testimony, and his memorandum of August 4, 2014, contains even more devastating statements about her ineptitude. Those memos recounted what Arnold thought about Gooden *before and after appellant's trial*.

This Court should assess *Brady* materiality based on the contents of Arnold's memoranda instead of disregarding his testimony entirely because of the erroneous belief that the trial court found him completely incredible. ***The court of appeals correctly noted that, without Gooden's testimony, the jury could not have convicted appellant of a Class A misdemeanor***, as she provided the only evidence that appellant's blood-alcohol level exceeded 0.15. There is a reasonable probability that, had the State disclosed the impeachment evidence, the trial court would have excluded Gooden's testimony, which also would have excluded the blood-alcohol evidence. Alternatively, there is a reasonable probability that, had the trial court

632 F.2d 478, 481 (5th Cir. 1980) (prosecution team includes both investigative and prosecutorial personnel); *In re Brown*, 952 P.2d 715, 719-20 (Cal. 1998) (police crime lab was part of prosecution team for purposes of *Brady*).

permitted Gooden to testify subject to "painful cross-examination," the jury would not have found that appellant's blood-alcohol content was over 0.15 and would not have convicted her of a Class A misdemeanor.[2] Yet, as discussed *infra*, if the jury disbelieved Gooden because it doubted her qualifications or the reliability of her opinion, it probably would have acquitted appellant altogether because the State admitted that the police's intoxication investigation was weak.

The Court should grant rehearing and reassess *Brady* materiality based on an accurate assessment of the trial court's fact findings regarding Arnold's credibility. Allowing an opinion based on substantial factual and legal errors to stand intact would contradict applicable Supreme Court authority.

## THIRD REASON FOR REHEARING

### The Court Erred In Misstating That Appellant Conceded That Gooden Properly Analyzed Her Blood.

The Court repeatedly asserted that appellant conceded that Gooden properly analyzed her blood:

- "Andrea Gooden was a laboratory technician who, *as everyone seems to agree*, properly analyzed Appellant's blood for alcohol content . . . ." Slip Op. at 1 (emphasis added).

[2] The Court erroneously asserted that appellant does not argue that the suppressed evidence was material to punishment. Slip Op. at 20, n. 45. Gooden's testimony was material to whether the jury found that appellant's blood-alcohol level exceeded 0.15, which determined whether she was guilty of a Class A misdemeanor (if the jury believed Gooden) or of only a Class B misdemeanor (if the jury doubted Gooden about the blood-alcohol level but nonetheless believed that appellant was intoxicated).

- "The habeas court's *unchallenged findings of fact regarding Gooden's analysis* and testimony also supports the conclusion that the undisclosed evidence was not material to the jury's special-issue finding that Appellant's BAC was 0.15 or more." Slip Op. at 21 (emphasis added).

- ". . . Appellant does not challenge, that there was no evidence of any error in . . . Gooden's analysis of Appellant's blood." *Id*.

- "Gooden followed all of the lab's standard operating procedures when analyzing Appellant's blood. Her analysis of Appellant's blood sample revealed a blood alcohol level of 0.193." Slip Op. at 22.

- "And there was overwhelming and *uncontested evidence* of Appellant's intoxication to sustain Appellant's conviction *for Class A misdemeanor DWI*." Slip Op. at 25-26 (emphasis added).

Appellant never has conceded that Gooden analyzed the blood accurately. To the contrary, appellant strongly challenged the blood evidence at trial and in the habeas proceeding. The record demonstrates that the defense argued at trial that the blood analysis was unreliable:

- During the two hours and 18 minutes that Bounds was responsible for appellant's blood, there were at least two extended periods of time totaling between one-to-two hours that he did not have custody of it, that it was unattended, and that its location was not documented (5 R.R. 377-85; AX 12-2 at 214-22).

- Gooden acknowledged that there was an irregularity because the tubes of blood were missing the identifying labels that the police officer and/or nurse should have placed on them when the blood was drawn (5 R.R. 436-37; AX 12-2 at 273-74).[3]

[3] This admission by Gooden contradicts the Court's assertion "that there was no evidence of any error in the labeling of Appellant's blood . . . ." Slip Op. at 21.

- Appellant tried to impeach Gooden with her violations of standard operating procedures, her general incompetence, problems with the internal blood control solution that she used to analyze appellant's blood, and her inability to perform Widmark formula calculations (5 R.R. 512-619, 634-35; AX 12-3 at 61-168, 183-84).

- Appellant demonstrated that Gooden was a poor science and math student in college (5 R.R. 522-31; AX 12-3 at 71-80).

- Appellant's was only the *second* blood-alcohol test that Gooden had performed, as she had been performing tests unsupervised for only two or three weeks (5 R.R. 519-20; AX 12-3 at 68-69).

- Defense counsel began his summation: "The very first thing I told you in my opening statement was that this case would be about whether you trusted what you saw with your own eyes on the videotape or whether you trusted the testimony of a totally incompetent police officer who has no business handling matters of this seriousness and *whether you trust the testimony of an underqualified analyst who works in a lab that does not even follow its own internal standard operating procedures*" (5 R.R. 764; AX 12-4 at 17) (emphasis added).

- Defense counsel argued during summation, "you would have to believe beyond a reasonable doubt that the blood was collected properly, that it was transported by Deputy Bounds properly, that it was processed properly by the lab and that it was analyzed properly. The State cannot carry that burden" (5 R.R. 765; AX 12-4 at 18).

- Defense counsel emphasized during summation that Bounds admitted that he destroyed his contemporaneous, handwritten notes, that he made countless mistakes in his offense report, that he was testifying to what the prosecutor wanted him to say was on the videotape, that his memory was bad, and that he could not remember the details of any particular traffic stop (5 R.R. 768-69; AX 12-4 at 20-21).

- Regarding the blood evidence, defense counsel argued during summation: "You cannot convict unless you believe Andrea Gooden beyond a

reasonable doubt"; appellant's was only Gooden's second test; the lab made a variety of mistakes inconsistent with its own standard operating procedures; no one could account for what happened to the blood between the time the nurse drew it from appellant and when the lab received it for analysis; the nurse used an improper technique when she drew the blood that risked contaminating the sample and affecting the analysis; Bounds did not transport the blood evidence properly, and the blood could have had improper contact with the stopper in the tube, which could have affected the integrity of the sample; the blood evidence was missing an important label; the lab used a different instrument for the analysis than what its operating procedures required; the lab used an improper procedure to make a solution used for the analysis; an instrument used in the lab failed inspection; and, regarding Gooden, counsel argued, "you cannot have confidence in her ability to do work now in the lab where she was getting Cs, Ds and Fs throughout her college career in science and math classes" (5 R.R. 771-75; AX 12-4 at 24-28).

- In a moment of clairvoyance, without knowing about the Hurtado mislabeling incident only weeks earlier, defense counsel argued during summation, "***The biggest risk is that Ms. Gooden mixed up a sample with somebody else.*** She's a rookie. Mistakes happen. No one is even standing over her shoulder to make sure she is doing it right. This is only the second time that she's done one of these tests." (5 R.R. 772-73; AX 12-4 at 25-26) (emphasis added).

- And in a moment of extraordinary irony, defense counsel concluded his summation: "All of yesterday, sitting on the front row was Ms. Gooden's boss, the director of that lab [William Arnold]. He sat through her testimony. He sat through Dr. Wimbish's testimony. He was there. He was available to come take this witness stand and to challenge anything I said and anything Dr. Wimbish said to try to clean up any of the holes I poked in the analysis. The Government could have called that witness. Did they? No. Don't you know if he had one thing to say to dispute Dr. Wimbish or my cross-examination of Ms. Gooden, he would have been up on that witness stand doing it? But they didn't call him" (5 R.R. 779-80; AX 12-4 at 32-33).[4]

[4] Everyone now knows that Arnold did not testify because he did not want to have to disclose that he believed Gooden was incompetent.

- Defense counsel argued at the conclusion of the habeas evidentiary hearing: "So there was a factual basis to make the argument that the biggest risk in the case was that Ms. Gooden mixed up the sample with someone else. And I didn't even know at that time that one of the reasons that she had been suspended 2 weeks earlier was because she had issued a lab report with the wrong Defendant's name on it, where that blood had come in with mixed-up labels. It is unbelievable. Can you imagine what I would have done with that information?" (3 R.R. 23).

To suggest that appellant agrees that Gooden properly analyzed her blood completely misrepresents the record. The Court also ignored that the trial prosecutor argued that Gooden's testimony was the most important reason to convict appellant (5 R.R. 792-94; AX 12-4 at 45-47) (emphasizing during summation blood analysis, arguing that result confirmed that appellant was intoxicated; that appellant has high tolerance; that blood and extrapolation evidence was "really important"; and that, if jury believed blood evidence, appellant was above legal limit). The prosecutor had to argue that appellant had high tolerance and the blood evidence was "really important" because appellant's appearance on video did not comport with the result of Gooden's blood analysis.

Appellant has sought a fair retrial at which she can present Arnold's opinion about Gooden's incompetence, including her failure to follow standard operating procedures *in appellant's blood analysis*. Under the Sixth Amendment, a jury decides whether appellant is guilty (including whether her blood-alcohol level was over 0.15) after a fair trial at which appellant can present all available impeachment

evidence known to the prosecution and its agents. Appellant was denied her constitutional right to a fair trial because she could not impeach Gooden with Arnold's forceful doubts about her competency. Appellant is constitutionally entitled to subject Gooden to the "painful cross-examination" that Arnold successfully prevented through subterfuge and deceit.[5]

The Court should grant rehearing and reassess *Brady* materiality by fairly considering that appellant always contested the accuracy and reliability of Gooden's blood analysis. Specifically, it should consider the materiality of the suppressed evidence in light of how it would have supported the defense theory that the jury should acquit appellant because the blood analysis was unreliable.

## FOURTH REASON FOR REHEARING

### The Court Erred In Giving Significant Weight To Bounds' Testimony In Its *Brady* Materiality Analysis.

The Court erred in giving substantial weight to deputy constable Justin Bounds' testimony that appellant was "clearly intoxicated" when he stopped her car. It emphasized that testimony in its materiality analysis. Slip Op. at 20-21. Bounds was the only prosecution witness besides Gooden. The characterization of his testimony as "overwhelming evidence" ignores several important, undisputed facts

[5] Of course, at a retrial the State would be free to attack Arnold's credibility and argue that the supervisor of the HFSC toxicology section was lying about Gooden, even though he was promoted and received a pay raise after the Gooden debacle. Justice requires that a jury be allowed to sort out the truth.

that destroyed his credibility:

- Bounds' supervisor instructed him not to preserve the in-car video that depicted appellant's driving;
- he lost the handwritten notes that he took the night of the incident;
- he admitted that his offense report contained numerous errors;
- he admitted that the prosecutor made handwritten notes on his offense report of additional "clues of intoxication" that the prosecutor observed on the video but that Bounds did not include in his report—meaning he embellished his testimony on direct examination about the "clues" that he allegedly observed after the prosecutor prepared him to testify; and
- he admitted that deputy constable Jennifer Francis did not properly administer the field sobriety tests to appellant.[6]

(5 R.R. 300-06, 309-11, 366; AX 12-2 at 137-43, 146-48, 164-67, 172-74, 203).

Bounds was not the unimpeached witness that the Court suggests. Indeed, in her closing argument, the prosecutor admitted, ***"It is pretty much undisputed that Deputy Bounds is not good at testifying. In fact, he's probably not a very good officer"*** (5 R.R. 782; AX 12-4 at 35) (emphasis added). ***She even called him "simple or dumb"*** (5 R.R. 784; AX 12-4 at 37).

[6] The trial court prohibited Francis from testifying because she and Bounds violated Rule of Evidence 614 by discussing the case with the prosecutor in each other's presence after the Rule was invoked and after Bounds began testifying (5 R.R. 185-86; AX 12-2 at 22-23). The State agreed not to offer evidence related to the horizontal gaze nystagmus test because Francis administered it (5 R.R. 189; AX 12-2 at 26). Thus, the only testimony regarding field sobriety tests came from Bounds, not Francis, regarding his observation of her administration of the walk-and-turn test the one-leg-stand tests.

The Court's reliance on Bounds' testimony in its *Brady* materiality analysis must account for the fact that, at a retrial with the suppressed impeachment evidence, a jury probably would place little to no weight on his testimony. Had the jury known about the incompetence of both prosecution witnesses, there is a reasonable probability that it would have acquitted appellant outright. The Court should grant rehearing and reassess *Brady* materiality by considering the totality of Bounds' testimony, including his substantial impeachment, instead of only considering the testimony that favored the verdict.

## FIFTH REASON FOR REHEARING

**The Court Erred In Applying Inconsistent, Incorrect, Diluted Standards Of Reviewing *Brady* Materiality Contrary To Supreme Court Precedent.**

The Court erred in applying inconsistent, incorrect, diluted standards of reviewing *Brady* materiality contrary to United States Supreme Court authority.

First, the Court asserts that it "must view the evidence in the record in the light most favorable to the judge's ruling [on a *Brady* claim] and must uphold that ruling *absent an abuse of discretion*." Slip Op. at 16 (emphasis added). However, that standard is predicated on the erroneous assumption that this case is brought under article 11.072. Next, the Court asserts, "Determining whether particular evidence was 'material' as part of a claimed *Brady* violation is a mixed question of law and fact. We give deference to the habeas court's factual findings underlying its decision

but *review the ultimate legal conclusion of materiality de novo*." *Id.* at 17 (emphasis added). Then, the Court states, "we *usually* accept [fact findings] if they are supported by the record." *Id.* at 17-18 (emphasis added). Why only *usually*? Why would the Court not *always* accept fact findings that are supported by the record? If the Court sometimes rejects fact findings that are supported by the record, what are the defining principles that guide litigants and lower courts in those scenarios? And if the converse is true—that the Court *usually* rejects fact findings that are not supported by the record—why did it blindly defer to the clearly erroneous findings in this case without considering appellant's arguments why they are not supported by the record? What makes this case *unusual*? Finally, the Court asserts that appellant "bears the burden of proving her claim *by a preponderance of the evidence*." *Id.* at 18 (emphasis added). To summarize:

- this Court reviews a trial court's "ruling" on a *Brady* claim for an abuse of discretion;
- it reviews *Brady* materiality *de novo*;
- materiality is a mixed question of law and fact;
- this Court *usually* accepts fact findings if they are supported by the record—but, apparently, sometimes does not; and
- appellant must prove that the State suppressed favorable, material evidence by a preponderance of the evidence.

Given this morass of standards, how is any litigant or court supposed to understand

how to analyze *Brady* materiality? This Court's attempt to explain the materiality standard evokes Lewis Carroll's masterpiece, *Through The Looking Glass*:

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

The applicable *Brady* standard should be what the Supreme Court decided decades ago. No more, no less. According to that Court, appellant has a burden of proving by *less than by a preponderance of the evidence* that the result of the proceeding would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Three undisputable precepts emerge from the Supreme Court's post-*Brady* discussion of materiality, all of which this Court ignored in its opinion:

1. appellant need *not* prove that, but for the suppressed evidence, she would have been acquitted, *Kyles,* 514 U.S. at 434;

2. she need *not* prove that, but for the suppressed evidence, the remaining evidence was legally sufficient to sustain the conviction, *id.* at 435; and

3. she only must demonstrate a reasonable probability of a "different result," but not a "different verdict," meaning that the issue is whether she received a fair trial resulting in a verdict worthy of confidence. *Id.* at 434; *United States v. Bagley*, 473 U.S. 667, 676 (1985).

A criminal trial has only three possible results: (1) conviction, (2) acquittal, or (3) mistrial. Mistrials most commonly result from hung juries, although they also may

result from irreparable errors that cannot be cured through less drastic alternative measures. A criminal jury hangs even if only *one* juror holds out from returning a verdict. All *Brady* claim arise post-*conviction*, not after acquittals or mistrials. Therefore, *Bagley*'s definition of materiality—a "different result"—must mean any result *other than* a conviction. In the universe of other possible results, there are two—acquittal and mistrial. But the Supreme Court also instructed in *Kyles* that, to establish materiality, a defendant need not prove that she would have been acquitted nor that there would have been a different verdict. Thus, "different result" means something more than just an acquittal. A mistrial is a result "different" from conviction. This Court erred in failing to consider that the materiality standard of a "different result" includes a mistrial arising from a hung jury.

Notably, in *Kyles* the Supreme Court suggested that *Brady* materiality analysis considers the effect of the nondisclosed evidence ***on any one member*** of the jury. *See Kyles*, 514 U.S. at 448 (discussing materiality of suppressed evidence, "If a police officer thought so, ***a juror*** would have, too.") (emphasis added). The Court also repeatedly noted that Kyles' first trial ended in a mistrial after a hung jury. *Id.* at 454 ("This is not the 'massive' case envisioned by the dissent . . . ; it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict."). These passages support appellant's argument that a "reasonable probability" of a "different result"—in the parlance of *Brady* jurisprudence—

contmeplates a hung jury. *See also McCray v. Capra*, 2018 WL 3559077, at *4 (N.D.N.Y. July 24, 2018) (Supreme Court suggests that, in considering *Brady* materiality, courts should consider whether undisclosed evidence would lead to different result, ***including hung jury***, citing *Turner v. United States*, 137 S.Ct. 1885, 1898 (2017) (Kagan, J., dissenting) (all members of Court "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a 'reasonable probability' that disclosure of the evidence would have led to a different outcome—*i.e.*, an acquittal or ***hung jury*** rather than a conviction") (emphasis added). Importantly, the *Turner* majority did not dispute Justice Kagan's characterization of a "different outcome."

The question is not whether appellant more likely than not would have received a different verdict, but whether she received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles*, 514 U.S. at 434. Appellant has satisfied the only *Brady* standard that matters and is entitled to a retrial.

## CONCLUSION

The Court should grant rehearing, order additional briefing and argument, and affirm the judgment of the court of appeals granting habeas corpus relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I served a copy of this brief on Patricia McLean, assistant district attorney for Harris County, and on Stacey M. Soule, State Prosecuting Attorney, by electronic service on June 25, 2020.

/s/ Josh Schaffer
Josh Schaffer

## CERTIFICATE OF COMPLIANCE

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